



DATE PREPARED: 5/14/82

RE: RINEHART ORCHARDS, INC., 82-TLC-3

THIS IS A DECISION IN RESPONSE TO THE REQUEST OF RINEHART ORCHARDS, INC., FOR EXPEDITED ADMINISTRATIVE-JUDICIAL REVIEW, PURSUANT TO 20 C.F.R. §655.212, OF A DENIAL, ON APRIL 28, 1982, OF ITS APPLICATION FOR TEMPORARY LABOR CERTIFICATION BY WILLIAM J. HALTIGAN, THE REGIONAL ADMINISTRATOR (RA). ON APRIL 6, 1982, EMPLOYER SUBMITTED AN APPLICATION FOR THIRTY-ONE ALIEN WORKERS TO ASSIST IN HARVESTING THE 1982 PEACH AND APPLE CROPS IN WASHINGTON COUNTY, MARYLAND. THE RA DENIED THE APPLICATION BECAUSE EMPLOYER'S WAGE OFFER OF 21 CENTS PER 1,238 CUBIC INCH UNIT FOR PEACH PICKING AND 40 CENTS PER 2,419.22 CUBIC INCH UNIT FOR FALL APPLE PICKING WERE BELOW THE PREVAILING WAGE RATES AS ESTABLISHED BY THE STATE OF MARYLAND. ADDITIONALLY, THE RA FOUND THAT EMPLOYER'S PRODUCTIVITY REQUIREMENTS WERE EXCESSIVE. THUS, THE RA WAS UNABLE TO AFFIRM, AS REQUIRED BY §655.200, THAT THE EMPLOYMENT OF THE ALIENS WOULD NOT ADVERSELY AFFECT THE WAGES AND WORKING CONDITIONS OF SIMILARLY EMPLOYED UNITED STATES WORKERS. THE RA FURTHER NOTED THAT ATTACHMENT NUMBER 1 TO EMPLOYER'S JOB ORDER WITH THE MARYLAND STATE EMPLOYMENT SERVICE (FORM ETA 790) IMPOSED PRODUCTIVITY STANDARDS AND THE POSSIBLE COMPLETION OF A MEDICAL HISTORY FORM. SINCE NEITHER REQUIREMENT HAD APPEARED ON THE APPLICATION, EMPLOYER WAS IMPOSING RESTRICTIONS OR OBLIGATIONS ON U.S. APPLICANTS NOT IMPOSED ON THE ALIENS, IN VIOLATION OF §656.202(a). EMPLOYER DOES NOT DISPUTE THAT THE WAGE RATE FOR PICKING APPLES IS BELOW THE PREVAILING WAGE RATE AS ESTABLISHED BY THE STATE OF MARYLAND. RATHER, EMPLOYER ARGUES THAT THE REVISED DOMESTIC AGRICULTURAL IN-SEASON WAGE REPORT FOR THE 1981 APPLE HARVEST (ES-232) PUBLISHED BY THE STATE OF MARYLAND DEPARTMENT OF HUMAN RESOURCES ON JANUARY 28, 1982, ESTABLISHES AN ERRONEOUS PREVAILING WAGE RATE.

SPECIFICALLY, EMPLOYER HAS CONTENDED THAT THE EASTERN APPLE BOX (2,419.22 CUBIC INCHES) RATHER THAN THE BUSHEL (2,150.42 CUBIC INCHES) IS THE UNIVERSAL UNIT OF MEASURE FOR APPLE-PICKING. THE RA WAS INFORMED OF THIS CRITICISM OF THE ES-232 ON MARCH 23, 1982. HE AGREED TO A REVIEW OF THE WAGE SURVEY BY FEDERAL STAFF. THIS REVIEW, WHICH VALIDATED THE ES-

232, WAS CONDUCTED PRIOR TO THE DENIAL OF THE APPLICATION. EMPLOYER WAS GIVEN AN OPPORTUNITY TO CHANGE ITS WAGE OFFER TO THE PREVAILING WAGE OF 40 CENTS PER BUSHEL BUT HAS NOT DONE SO. THEREFORE, DESPITE EMPLOYER'S PROMISE TO PAY THE CURRENT ADVERSE EFFECT WAGE RATE THAT WOULD BE APPLICABLE DURING THE PERIOD OF EMPLOYMENT, IT MUST BE ASSUMED THAT EMPLOYER REMAINS UNWILLING TO OFFER THE JOB OPPORTUNITY TO U.S. WORKERS ON THE BASIS OF THE PREVAILING WAGE RATE AS DETERMINED BY THE ES-232. WHATEVER MAY BE THE MERITS OF EMPLOYER'S ARGUMENTS CONCERNING THE CRITERIA FOR ESTABLISHING THE PREVAILING WAGE RATES, IT CANNOT BE SAID THAT THE RA ACTED ARBITRARILY OR CAPRICIOUSLY IN BASING HIS DENIAL OF THE APPLICATION ON THE DISCREPANCY BETWEEN EMPLOYER'S WAGE OFFER AND THE PREVAILING WAGE RATE. THE RA CONSIDERED EMPLOYER'S ARGUMENTS AND CONDUCTED A RE-EXAMINATION OF THE ES-232 BEFORE REACHING HIS DECISION. THAT DECISION IS SUPPORTED BY THE RECORD AND IS AFFIRMED HERE. FOR SIMILAR REASONS, THE RA'S FINDINGS WITH RESPECT TO EMPLOYER'S PRODUCTIVITY REQUIREMENTS AND THE POSSIBLE OBLIGATION OF U.S. APPLICANTS TO COMPLETE A MEDICAL HISTORY FORM ARE SOUNDLY BASED ON THE EVIDENCE OF RECORD AND ARE AFFIRMED HERE. EMPLOYER'S ARGUMENT THAT PRODUCTIVITY FIGURES BASED ON THE 1981 SEASON ARE UNREALISTIC DUE TO LIGHT CROPS IN THAT YEAR INVOLVING MUCH SCATTERED PICKING HERE CONSIDERED BY THE RA. HE FOUND MERIT IN EMPLOYER'S CONTENTION AND CONDUCTED A REVIEW OF THE 1979 AND 1980 SEASONS. HE BASED HIS DECISION ON THE FACT THAT PRODUCTIVITY FIGURES FOR THOSE YEARS WERE ALSO LESS THAN THE STANDARDS REQUIRED BY EMPLOYER AND ON THE FACT THAT EMPLOYER HAD SUBMITTED NO DOCUMENTATION CONCERNING PRODUCTIVITY REACHED IN EARLIER YEARS. REGARDING THE MEDICAL HISTORY FORM, THE RA SIMPLY REQUESTED THAT EMPLOYER EITHER APPLY THIS REQUIREMENT TO THE ALIENS OR DELETE IT FROM THE JOB ORDER. THE DENIAL OF THE REGIONAL ADMINISTRATOR IS AFFIRMED. FURTHER REVIEW MAY BE OBTAINED BY FILING A PETITION WITH THE DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, IN YOUR GEOGRAPHIC AREA PURSUANT TO 8 C.F.R. §214.2(h)(3)(i).

G. MARVIN BOBER
ASSOCIATE CHIEF JUDGE
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES